

# The Right to Counsel — A Right in Civil Cases, Too?

## Arguing for a right to representation in all cases where human needs are at stake

By Andrew F. Susko, Rhodia D. Thomas and Sam Milkes

**T**ry it sometime and you will probably experience the same results we do. Stand in front of a group of nonlawyers — perhaps a group of students at your local high school or a gathering of senior citizens who came to hear about living trusts — and ask them this series of questions:

- Does a person who claims to be physically abused in his or her home have a right to an appointed attorney to help get a protection-from-abuse order?
- Does a child who is being neglected or abused have that right?
- What about the child's parents?
- What about a family that is faced with loss of their home in a foreclosure or an eviction?

It is telling that Pennsylvanians typically believe that a victim of domestic violence and a family facing foreclosure have a right to be represented by an attorney. They say the same thing about tenants being evicted. They are wrong, of course.

People usually believe that a child has a right to counsel in a dependency proceeding, and they are right. Responses are mixed on whether parents have a right to counsel, but in Pennsylvania they do.

The fact that our neighbors believe there is a general right to counsel in such fun-

damental areas is not just an interesting human-interest factoid, it is a dramatic statement about the public perception of the fairness of our justice system and the need for meaningful access to justice. Is there “liberty and justice for all” if a family can lose their home, never having been able to obtain counsel to defend themselves?

Efforts of the organized bar to promote a right to counsel in certain civil cases, mirroring the right to counsel in criminal cases, are noteworthy right here in Pennsylvania. After the American Bar Association endorsed a civil right to counsel in 2006, the Pennsylvania Bar Association became only the second state bar association to do so, in 2007, endorsing a right to counsel where basic human needs are at stake. The civil right to counsel in such cases would be a watershed legal right and a critical component of our justice system; not a right to counsel in all civil cases, but only in matters impacting basic human needs.

In 2008, 200 lawyers, along with clients served by legal aid, met on Capitol Hill in Harrisburg to state the case for legal services. That effort must be ongoing. Since that time, both the PBA and local county bar associations have focused on implementation strategies. Of particular note is the work of the Philadelphia Bar Association Civil Gideon Task Force, which is highlighting pilot projects, including the Philadelphia court's nation-



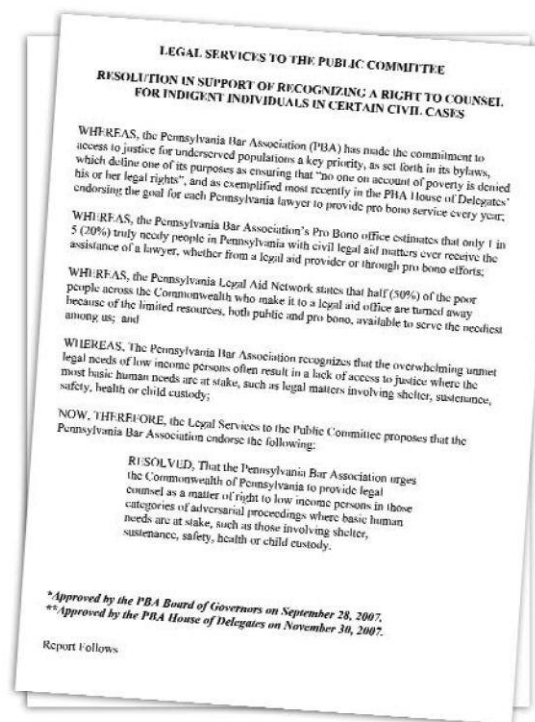


Resolution of the PBA Legal Services to the Public Committee approved by the House of Delegates in November 2007 recognizing a right to counsel for indigent individuals in certain civil cases

ally recognized Mortgage Foreclosure Diversion Program, an important model to advance the right to counsel in civil cases. Successful mortgage diversion and mediation programs are in place in other parts of the state, including Allegheny, Bucks, Chester, Lackawanna and Northampton counties.

The Philadelphia bar's Civil Gideon Task Force has recommended a legislative strategy that addresses the longer-term aspects of funding such a legal right, including demonstrating the overall economic benefit of legal services. While provision of counsel will cost money, there are real economic benefits, too. A study in Texas found that for every dollar spent on legal services, additional dollars were saved in terms of public assistance benefits and internal costs borne by the justice system when there is no representation. See *The Impact of Legal Aid Services on Economic Activity in Texas: An Analysis of Current Efforts and Expansion Potential* (February 2009) online at [www.texasatj.org/files/EconImpactStudy021209.pdf](http://www.texasatj.org/files/EconImpactStudy021209.pdf). The report includes an important finding that legal services representation and activity provides a sizable stimulus to the Texas economy, generating approximately \$30 million in annual revenue, in excess of six times the budget for legal services.

Similarly, a 2009 Pennsylvania Interest on Lawyer Trust Account (IOLTA) Board report indicates that the total economic impact of legal assistance funded by the Access to Justice Act between 2004 and 2008 was \$154 million, including \$68 million in economic activity in local communities. That report can be found online at [www.paiolta.org/AJARReport/Report.pdf](http://www.paiolta.org/AJARReport/Report.pdf).



Our Pennsylvania Constitution is emphatic about the accessibility of courts to the people: "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Article I, Section 11.

While our courts have consistently held that there is no generalized right to counsel in civil proceedings, courts have also rejected any simplified civil-criminal distinction and instead have held that there does exist such a right in cases involving "a fundamental or substantial right under the United States or Pennsylvania Constitutions." *Weir v. Weir*, 428 Pa. Super. 515, 528 (1993). See also *Carnes v. Carnes*.

The organized bar embraced the need for accessibility when the PBA House of Delegates passed the resolution endorsing a right to counsel where basic human needs are at stake. Our state constitution speaks to what we might regard as basic human needs when it guarantees Pennsylvanians "certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquir-



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There are a number of areas in which Pennsylvanians have a declared right to counsel in civil cases, either because of enacted statutes or constitutional findings of the courts.

ing, possessing and protecting property and reputation, and of pursuing their own happiness.” Article I, Section 1.

In fact, there are a number of areas in which Pennsylvanians have a declared right to counsel in civil cases, either because of enacted statutes or constitutional findings of the courts. They include the following: dependency cases, where parents and children are appointed counsel; termination of parental rights, in which parents and children are appointed counsel; paternity cases, in which the purported parent is appointed counsel; involuntary commitments; guardianship cases; for defendants charged with contempt of support orders; for plaintiffs in child support cases where federal Section IV-D funds are at stake; for individuals the commonwealth is proposing to force feed; and for pregnant minors seeking abortions.

So, where the needs at stake are sufficiently important, a right to counsel in civil cases has been recognized by our courts and by our Legislature. It is time now to take action to assure competent representation in all civil matters impacting basic needs.

As a first step in trying to move forward in Pennsylvania, we can look to the many state and local bar associations across the nation, including the PBA, that have passed resolutions embracing the idea of the right to a lawyer in civil cases where “basic human needs are at stake.” In addition to Pennsylvania, we can look to Massachusetts, California, Texas and New York as examples of success.

In Massachusetts, the Boston Bar Association’s Task Force on Expanding the Civil Right to Counsel determined that it would create two pilot projects targeting landlord-tenant matters “where the eviction is related to a mental disability or criminal conduct or where a power imbalance exists that is likely to deprive a tenant of an affordable apartment.”

In California, Gov. Arnold Schwarzenegger signed the Sargent Shriver Civil Counsel Act into law on Oct. 11, 2009. This legislation provides funding for a six-year pilot program to “test the effectiveness of significantly expanding access to counsel at public expense to poor individuals in certain high stakes cases.” A task force has been established to implement the pilot projects slated to begin in July 2011. Funding for this project will come from a \$10 filing fee on certain types of court filings.

In Texas, the Texas Access to Justice Foundation has announced two special impact initiative grants in a new category, Civil Right to Counsel/Civil Gideon pilot projects. The grants will fund collaborative programs with the courts in underserved, remote or rural communities to provide representation where basic human needs such as shelter, sustenance, safety, health or child custody are at risk.

In New York, although legislation has yet to be enacted, the state bar has adopted the Access to Justice Report that urges that state’s Legislature to enact legislation that would provide counsel for “vulnerable low-income people who face eviction or foreclosure and to expand the right to

counsel in unemployment cases.” Also, in New York City, a bill is pending before city council that would provide counsel at public expense to those 62 years old or older who are faced with loss of their homes through eviction or foreclosure.

This is just a short list of the activities around the nation where the right to counsel in civil cases is being considered or implemented.

The legal profession has made a priority of providing adequate legal services to those who cannot afford them. The issue is one of fairness of the justice system, as well as the integrity of the quality of justice dispensed within that system. The Rev. Dr. Martin Luther King Jr., from a jail cell in Alabama, wrote, “Injustice anywhere is a threat to justice everywhere.” The Legal Services Corp. study titled “Documenting the Justice Gap,” (2005, updated in 2009) identifies the problem clearly. From a national perspective, and equally valid for Pennsyl-

vania, only one in five low-income Americans sees his or her legal needs met, and for every eligible person who presents himself or herself to a legal aid entity for assistance, one is turned away.

The need for legal representation in civil cases where life needs are threatened is as compelling in many respects as the right to counsel in criminal cases. Right now a defendant charged with retail theft has a right to counsel, while a family faced with losing their home does not. Every day across this commonwealth, our courts and, in particular, our judges protect the individual rights and liberties of our citizens. When we think of important watershed legal rights, such as those addressed in *Brown v. Board of Education*, we know that these legal rights cannot have full meaning and our justice system cannot reach its full potential unless those rights can be enforced and protected. When a person is threatened with loss of his or her home or is being physically abused, for example, a right to counsel should be

available. It is in this way that our justice system will truly provide liberty and justice for all. ♦



Andrew F. Susko



Rhodia D. Thomas



Sam Milkes

Andrew F. Susko, a former PBA president, is a partner and chair of the litigation department at White and Williams L.L.P. in Philadelphia. Rhodia D. Thomas is executive director of MidPenn Legal Services. Sam Milkes is executive director of the Pennsylvania Legal Aid Network.

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**DEASEY MAHONEY  
VALENTINI & NORTH LTD**  
ATTORNEYS AT LAW



**Philadelphia Office**

1601 Market Street, 34th Floor, Philadelphia, PA 19103  
215-587-9400 (Tel.)/215-587-9456 (Fax)

**Media Office**

103 Chesley Drive, Suite 101, Media, PA 19063  
610-892-2732 (Tel.)/610-892-2926 (Fax)

**New Jersey Office**

80 Tanner Street, Haddonfield, NJ 08033-2419  
856-429-6331 (Tel.)/856-429-6562 (Fax)

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Mr. Valentini, who has practiced law since 1989, litigates in the areas of products liability, construction site injury, construction defects, crane litigation, professional liability, premises liability, complex litigation, insurance coverage and bad faith, subrogation, excess insurance, and transportation.

Ms. North, who has practiced law since 1991, litigates in the areas of products liability, construction site injury, automotive and premises liability in state and federal courts in the eastern half of Pennsylvania and southern New Jersey.